

(Farman)



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Major Stephen M. Hartnett, USMC (Retired) -
Reconsideration - Suspension of Retired Pay -
Employment by Foreign Government

File: B-220860

Date: February 2, 1990

DIGEST

In 65 Comp. Gen. 382 (1986), we held that a retired U.S. Marine Corps officer, ostensibly employed by a U.S. corporation which furnished services to the Royal Saudi Naval Forces (RSNF), was actually an employee of the Saudi Arabian government and, as such, was required to obtain consent under 37 U.S.C. § 908 before payments of his military retired pay could be resumed. Arguments submitted in support of a request for reconsideration of this decision do not change our conclusion that the RSNF had the right to control, supervise and direct the work of the retired officer, the key elements in our determination that he was employed by the foreign government. Accordingly, our previous decision is affirmed.

DECISION

Frank E. Basil, Inc. (Basil), through its counsel, seeks reconsideration of our decision 65 Comp. Gen. 382 (1986). We held that Major Stephen M. Hartnett, USMC (Retired), who was employed under an agreement with Basil to be a Marine Corps Seamanship Instructor for the Royal Saudi Naval Forces (RSNF), was subject to the supervision and control of the RSNF, which was the source of funds for his salary and other emoluments. Therefore, we held that Major Hartnett's military retired pay had to be suspended because he was subject to Article I, section 9, clause 8, of the U.S. Constitution, which prohibits officers of the United States from accepting any office or emolument from a foreign government without having obtained congressional consent. Upon reconsideration, we affirm our prior decision.

BACKGROUND

As noted in the prior decision, Major Hartnett filed Marine Corps DD form 1357, "Statement of Employment," in May 1985.

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On this form he indicated that he was employed by Frank E. Basil, Inc., Washington, D.C., as a Marine Corps Seamanship Instructor, RSNF, Jeddah, Saudi Arabia. Additionally, he supplied a copy of his employment agreement in which he agreed to work for Basil, a corporation incorporated in Delaware, for 24 months commencing on May 25, 1985, or when he arrived in Saudi Arabia, whichever was later.1/

After reviewing the employment agreement, the Marine Corps determined that Major Hartnett was an employee of the Saudi Arabian government since the RSNF could control and direct him. As a consequence, the Marine Corps suspended Major Hartnett's retired pay and advised him to request approval of his employment under 37 U.S.C. § 908. Section 908 affords the requisite congressional consent to the civil employment of a retired U.S. service member by a foreign government provided that such employment is approved by the appropriate service secretary and the Secretary of State.

When Major Hartnett declined to request approval, asserting that he was not employed by a foreign government, the disbursing officer referred the matter to us for an advance decision. Primarily relying on the same provisions in the employment contract as did the Marine Corps, we agreed that Major Hartnett was an employee of the Saudi Arabian government and, therefore, was required to seek approval for such employment under 37 U.S.C. § 908.

DISCUSSION

In seeking reconsideration, Basil relies upon selected portions of the prime contract between the RSNF and SIBC-Basil.2/ In particular, Basil cites General Provision 17 of that contract, which states that SIBC-Basil:

". . . shall maintain complete administrative control over its employees, representatives, and subcontractors at any tier. The Government [Saudi Arabia] further agrees that all persons employed by [SIBC-Basil] in connection with this Contract shall be [SIBC-Basil] employees and not employees of the Government and nothing contained in this

1/ Major Hartnett is no longer employed by Frank E. Basil, Inc.

2/ SIBC-Basil is a joint venture of a Saudi International Business Centre, a privately-owned Saudi company, and Frank E. Basil, Inc., which provides technical support and on-the-job training services to RSNF.

Contract, or any subcontract awarded [by SIBC-Basil] shall create any contractual relationship between such subcontractor or employee and the Government [Saudi Arabia]." (Emphasis provided by Basil.)

Basil also relies on portions of the subcontract between SIBC-Basil and Basil. This subcontract requires that Basil provide qualified personnel to maintain and operate RSNF facilities and equipment. Additionally, the subcontract requires Basil to pay all salaries and benefits and to withhold taxes for its personnel.

Basil suggests that we erred in our analysis of the law relevant to this dispute. Basil argues that no employer-employee relationship existed between Major Hartnett and RSNF. Basil states that it retained the power to hire, fire, discipline, and promote Major Hartnett, as well as to control and supervise him. The General Counsel of the Department of Defense submitted a letter to us stating that the Department of Defense supports Basil's position.

Our decisions concerning whether an employer-employee relationship exists for purposes of the restrictions on foreign government employment have consistently applied the five-part test formulated by the Maryland Court of Appeals in National Paving and Contracting Co., 134 A.2d 296, 301 (1957), as follows:

"Coming now to the main question involved herein, it has been stated by this Court that there are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these indicia, excepting (4), seem controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is

his right to do so that is important." (Emphasis in original; citations omitted.)

Basil agrees that this five-part test is the appropriate one to use in deciding the question of whether Major Hartnett was an employee of the Saudi Arabian government.^{3/}

We have carefully examined the Basil submission with respect to each of the five factors. The following is our analysis of each factor.

1. The Selection and Engagement of the Employee

We do not dispute that Basil selected and engaged Major Hartnett to perform on-the-job training services for the RSNF.

2. The Payment of Wages

Basil paid Major Hartnett all his wages. However, a review of the case record indicates that Major Hartnett and other individuals working in Saudi Arabia for Basil were paid their wages out of the payments that the Saudi Arabian government made to Basil. Thus, the Saudi Arabian government was the original source of wages for Major Hartnett.

3. The Power to Discharge

Paragraph 16 of the employment agreement between Basil and Major Hartnett provides that the company may terminate the employee if "directed by the Saudi Arabian government to terminate the employment of the Employee." See also paragraph 10c of the subcontract between SIBC-Basil and Basil which recognizes the right of the Saudi Arabian government to order any person to be discharged and removed from the country. Thus, the Saudi Arabian government had the power to discharge Major Hartnett.

4. The Power to Control the Servant's Conduct

Basil contends that it and not the Saudi Arabian government had the power to control Major Hartnett's conduct. In this regard, we agree with Basil's definition of control stated as follows:

^{3/} Basil contends that one of our prior decisions applying the five-part test--53 Comp. Gen. 753 (1974)--is factually distinguishable from Major Hartnett's case. We agree; however, that decision was cited only for its description of the test itself.

". . . an employer-employee relationship exists when the employer reserves not only the right to control the result to be achieved, but also the means to be used in attaining the result. On the other hand, where the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists." Building Materials and Dump Truck Drivers v. NLRB, 669 F.2d 759, 764 (D.C. Cir. 1981), aff'd 459 U.S. 344 (1983).

Applying this definition, however, the contractual provisions clearly establish that the RSNF had the right to control both the results to be achieved and the means to achieve them. Section 1 of the contract between SIBC-Basil and RSNF states that SIBC-Basil will provide qualified personnel who "will perform their work functions by following RSNF manuals, procedures, instructions, and other applicable RSNF directives as identified by the RSNF." Also, as we pointed out in our prior decision, section 4 of Major Hartnett's employment agreement provides that, when directed to do so, he will work under direction and control of RSNF personnel.

5. Whether the Work is Part of the Regular Business of the Employer

Major Hartnett was hired to train members of the RSNF. In one respect, he was a consultant whose work was part of the regular business of Basil. On the other hand, providing training to members of the RSNF obviously was part of the regular business of the RSNF.

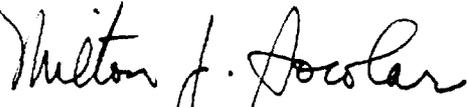
CONCLUSION

Under the five-part test above, we consider it undeniable that, for purposes of the constitutional prohibition, Major Hartnett was an employee of the Saudi Arabian government which had the power to fire him and, equally important, to control his conduct by supervising and directing his activities. It is the right, not necessarily the exercise thereof, that is important. See B-165378, Oct. 25, 1978.

The overriding purpose of Article I, section 9, clause 8, of the Constitution is to prevent any "influence by foreign governments upon officers of the United States." See 24 Op. Atty. Gen. 116 (1902). Our consistent position has been to give this constitutional provision the broadest possible scope and application. See 58 Comp. Gen. 487, 493 (1979). It is not our task to decide what services for foreign

governments may be performed by a retired military member. Rather, Congress has seen fit to delegate this responsibility to the Secretary of the service concerned (the Secretary of the Navy in this case) and the Secretary of State under 37 U.S.C. § 908. We believe that authority should have been utilized in Major Hartnett's case.

We do not lightly hold that Major Hartnett was required to forfeit his retired pay. However, this is a necessary consequence of the applicable legal provisions and Major Hartnett's refusal to seek approval for his employment. Therefore, our prior decision is affirmed.

for 
Comptroller General
of the United States